Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

TEYENT LOULOU,

Petitioner,

v.

JOHN ASHCROFT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Eighth Circuit can extend or reinstate a pre-existing grant of voluntary departure until the completion of the Petition for Review process.

PARTIES TO THE PROCEEDING

The caption of this Petition contains the only named parties to the instant proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Teyent Loulou petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's original opinion was filed on December 30, 2003.[1] Following a petition for rehearing, the Eighth Circuit filed a substituted opinion on April 28, 2004.[2] The substituted opinion is reported at 354 F.3d 706 (amended Apr. 28, 2004).

JURISDICTION

The judgment of the Eighth Circuit was entered on April 28, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the Voluntary Departure statute, 8 U.S.C. § 1229c(f) provides:

> (f) Judicial review.—
>
> No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b), nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

The relevant portion of the Judicial Review of Orders of Removal statute, 8 U.S.C. 1252, provides:

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[1] Pet. App. A-8 - A-13.
[2] Pet. App. A-1 - A-7.

(B) Denials of Discretionary Relief. —

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a).

The Judiciary and Judicial Procedure Statute, 28 U.S.C. § 2349 provides:

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending

the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

STATEMENT OF THE CASE

Voluntary departure is a time period during which a foreign national may leave the United States voluntarily rather than pursuant to a final order of removal.[3] The United States Court of Appeals for the Eighth Circuit, in deleting the portion of the original opinion that vacated the order of deportation and reinstating Loulou's previously granted voluntary departure period under terms and conditions prescribed by the BIA,[4] departed from its own precedent, and its sister First Circuit Court precedent regarding reinstatement of voluntary departure.[5]

Just two months after the Eighth Circuit's decision, the First Circuit reaffirmed the Circuit Court's authority to reinstate voluntary departure in *Kahlil vs. Ashcroft*, 370 F.3d 176 (1st Cir. 2004):

> The BIA had granted Kahlil a 30-day period of voluntary departure, which expired while his petition for review was pending before this court. We, as a matter of grace, reinstated that 30-day departure period so that Kahlil could leave the country voluntarily without incurring the penalties for forcible removal. *Id.* at 56. In doing so, we applied the Rule of *Umanzor-Alvarado vs. INS*, 896 F.2nd 14 (1st Cir. 1990) (Breyer, J.), which held that courts have the inherent equitable authority to decide on a case-to-case basis to reinstate the period of voluntary departure earlier granted by the BIA as part of their review of petitions challenging BIA actions. *Id.* at 16.[6]

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[3] Immigration and Nationality Act (INA) § 240B, 8 U.S.C. § 1229c.

[4] Pet. App. A-14 - A-15.

[5] Pet. App. A-1 - A-7; *Velasquez v. Ashcroft*, 342 F.3d 55, 59 (1st Cir. 2003); *Aiyadurai vs. INS*, 683 F.2d 1195, 1201 (8th Cir. 1982).

[6] *Citing to Khalil v. Ashcroft*, 337 F.3d 50 (1st Cir. 2003).

The Eighth Circuit opinion, which summarily deletes the portion of its opinion vacating the deportation order and reinstating voluntary departure, creates a split between the decisions of the United States Courts of Appeal on this important question of law. Moreover, the Eighth Circuit decision conflicts with the plain reading of the Illegal Immigration and Immigrant Responsibility Act (IIRAIRA) and legislative history and is inconsistent with federal courts' authority under the Immigration and Nationality Act (INA). The Eighth Circuit's unusual deletion of one portion of its opinion improperly circumscribes the authority of the courts and inflicts unexpected consequences upon Loulou. Ms. Loulou departed the United States after the Eighth Circuit's original opinion and before the Eighth Circuit's second opinion. Further, she left after the Citizenship and Immigration Service (CIS) District Director extended her voluntary departure, which the Eighth Circuit had earlier reinstated. The United States Courts of Appeal possess clear authority to affirm a lower court's grant of voluntary departure.

In the case at bar, the INA has worked precisely as Congress intended: Ms. Loulou, a highly educated, law-abiding woman, exercised her right to appeal an administrative agency's final administrative order to the Circuit Court on the merits of her asylum claim. Upon completion of judicial review, she departed the United States pursuant to voluntary departure. She is neither a criminal, nor a terrorist nor a threat to national security. Absent a reinstatement of voluntary departure, the effect on Ms. Loulou and her United States citizen family would directly contravene the spirit and intent of the statute. She will be subject to a ten-year bar to re-entry, making it increasingly more difficult to return to the United States legally to be reunited with her United States citizen spouse. "The

reunification of spouses and children is of the highest priority."[7]

Ms. Loulou was born in Addis Ababa, Ethiopia on June 6, 1973. From 1974 to 1991, Colonel Mengistu's militaristic government engaged in widespread torture and killing of all non-supporters in Ethiopia. In April 1991, the Ethiopian People's Revolutionary Democratic Front (EPRDF), which is primarily comprised of Tigreans, overthrew the Mengistu regime and seized power as the Transitional Government of Ethiopia (TGE). Unfortunately, the TGE regime merely supplanted one form of militaristic government for another.

The TGE controlled all branches of government for their benefit. They engaged in wide spread ethnic cleansing, political assassinations, illegal arrests, and detention of members and supporters of any political opposition parties. The TGE was in power from 1991 to 1995. In August 1995, the Federal Democratic Republic of Ethiopia (FDRE) came to power and maintains control to this day. The former TGE president, Meles Zenawi, remains Prime Minister of the new FDRE government.

The TGE and FDRE human rights abusers have been rampant. There has been much credible evidence of such abuses, including reports from international human rights organizations and major newspapers. Such abuses include the harassment, intimidation, and persecution of members of opposition political parties, who are required to register with the various government ministries.

Ms. Loulou's father was head of the Maritime Transit Service Corporation in Ethiopia. In 1993, the TGE forced Ms. Loulou's father out of his job because of his Amharan ethnic background. Her father lost his pension and was not provided the correct employment release forms, preventing him from securing employment elsewhere.

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[7] S. REP. NO. 104-250 (1996).

As a result, beginning in 1993, Ms. Loulou's father became more active in the All Amhara Peoples' Organization (AAPO). He attended meetings, educated others and became much more vocal about his dissent towards the government.

On September 20, 1994, Mr. Loulou participated in a rally protesting the trial of the AAPO President Asrat Woldeyes. Mr. Loulou was arrested, beaten, tortured, and interrogated for an extended period by TGE soldiers because of his participation in the rally and membership in the AAPO. He spent twenty days in prison without a trial and without the right to contact his family or an attorney. He was released on October 10, 1994 and left for dead on the outskirts of Addis Ababa. A passer-by found him on the streets and took him to St. Gabriel's hospital in Addis Ababa. A nurse contacted Ms. Loulou's mother and notified her that her husband was hospitalized, gaining and losing consciousness.

Between 1994 and 1996, Mr. Loulou was interrogated and arrested fifteen times. As a result of this persecution, Ms. Loulou's father went into hiding on August 19, 1996 out of concerns for his safety. However, the family has not heard from him since then. The TGE, in turn, responded to Mr. Loulou's disappearance by harassing Ms Loulou's mother. Mrs. Loulou was arrested and interrogated to determine the whereabouts of her husband. By February 1997, Mrs. Loulou had been taken to the police station four times and interrogated as well. She was slapped by the security officer and mistreated. Furthermore, security forces continue to search the Loulou family house without a warrant.

Ms. Loulou entered the United States in 1991 as a student. While in the United States, she obtained a bachelor's degree and married a United States citizen. In addition, she became an active and loyal member of the U.S. Chapter of the All Amhara's People Relief and Development Association (AAPRDA), a non-violent organization supporting the unity of Ethiopia and condemning discrimination and abuse against Ethiopians. Consequently,

Ms. Loulou was involved in public demonstrations against the Tigrean government. She believes that the Ethiopian government is aware of her involvement in these political activities. In 1993, she participated in a demonstration in support of Professor Asrat Woldeyes in Washington, D.C., where she made posters and sold pins and t-shirts to support AAPRDA and those families that are directly affected by the actions of the TGE. Ms. Loulou was also active in two days of rallies in Minneapolis, Minnesota at the Hilton Hotel on July 20th and 27, 1997. She also participated in a rally at the State Capitol in St. Paul, Minnesota in May 1997.

Based upon Loulou and her family's political outspokenness, Loulou sought refuge from the government of Ethiopia in the United States. Loulou applied for asylum with the United States Government in March 1997. The Immigration and Naturalization Service (INS)[8] initiated removal proceedings against Loulou in 1998. An Immigration Judge (IJ) denied Loulou's requests for asylum and witholding of removal.[9] The IJ ordered voluntary departure in lieu of removal.[10] Loulou timely appealed the IJ's decision to the Board of Immigration Appeals (BIA), which affirmed the IJ's decision without opinion.[11] The BIA further ordered that, pursuant to the IJ's order, Loulou was permitted to voluntarily depart from the United States.[12]

Fearing for her life if removed to Ethiopia, a country in which she had not lived for over a decade, Loulou petitioned the Eighth Circuit Court of Appeals for review of

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[8] On March 1, 2003, the INS ceased to exist as an independent agency within the United States Department of Justice. Part of its functions were transferred to Immigration and Customs Enforcement, a sub-branch of the Department of Homeland Security. *See* Homeland Security Act of 2002 § § 2, 101, 441, 442, 6 U.S.C.A. § § 101, 111, 251, 252 (West Supp. 2003).

[9] Pet. App. A-16 - A-18.

[10] *Id.*

[11] Pet. App. A-14 - A-15.

[12] *Id.*

the lower courts' decisions. The Circuit Court denied the petition for review, but vacated the order of deportation, and reinstated the grant of voluntary departure, citing to *Velasquez v. Ashcroft*[13] and *Aiyadurai v. INS.*[14] The Attorney General petitioned for rehearing and a panel issued an amended opinion deleting the reinstatement of voluntary departure.

Before the Eight Circuit Court issued its second opinion, Ms. Loulou requested that the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) grant her an extension of voluntary departure.[15] The purpose of the extension request was to enable her to celebrate her United States citizen husband's birthday on April 26, 2004. ICE approved her request, extending her time to depart from the initial departure date of March 21, 2004, to April 26, 2004.[16] Ms. Loulou purchased a one-way ticket to Ethiopia for April 26, and left the United States by the required departure date. She therefore complied with ICE's Notice of Action regarding voluntary departure.[17]

This case did not involve Loulou's appeal of a *denial* of voluntary departure nor did she seek to have the Court of Appeals for the Eighth Circuit *modify* the existing grant of voluntary departure. Two prior courts with jurisdiction to grant voluntary departure had already decided that issue and granted voluntary departure, and Loulou had settled expectations from those decisions. On appeal, the Eighth Circuit Court of Appeals originally simply followed the law and affirmed in part the lower court's decision. Their substituted opinion filed on April 28, 2004 prompts the instant Petition.

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[13] 342 F. 3d 55, 59 (1st Cir. 2003).
[14] 683 F.2d 1195, 1201 (8th Cir. 1982).
[15] Pet. App. A-19 - A-20.
[16] Pet. App. A-23 - A-25.
[17] Pet. App. A-21 - A-22.

REASONS FOR GRANTING THE PETITION.

I. THE EIGHTH CIRCUIT DECISION CONFLICTS WITH THE PLAIN READING OF THE VOLUNTARY DEPARTURE STATUTE THAT PERMITS FEDERAL COURTS TO EXERCISE THEIR POWERS REGARDING A PRE-EXISTING GRANT OF VOLUNTARY DEPARTURE.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)[18] made some significant changes to the grant of voluntary departure to a foreign national. For example, pre-IIRAIRA, there was no statutory limit on the voluntary departure period, and the regulations provided the District Director of the U.S. Citizenship and Immigration Service (the former INS) the authority to permit unlimited extensions to voluntary departure. After IIRAIRA, the district director may not grant extensions of the time period to depart voluntarily, which exceed 60 days.[19]

Before IIRAIRA, foreign nationals who did not depart within the specified period of voluntary departure were barred for five years from seeking relief from deportation, such as adjusting their status to that of a lawful permanent resident.[20] After IIRAIRA, failure to depart within the specified period subjects a foreign national to a ten-year bar from seeking relief from removal.[21]

Before IIRAIRA, INA §242B(2)(A) stated that a foreign national who overstayed the voluntary departure period could avoid the five-year bar upon a showing of exceptional circumstances. For foreign nationals granted

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[18] Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

[19] INA § 240B(b)(2); 8 C.F.R. § 1240.26(f)(3).

[20] INA § 242B(e)(2)(a) (1995).

[21] INA §240B(d).

voluntary departure after IIRAIRA, no exceptional circumstance exceptions for failing to depart exist, and there is a civil penalty for failure to depart of $1,000 to $5,000.

IIRAIRA also foreclosed a foreign national from appealing to the Circuit Court of Appeals a lower court's decision *denying* voluntary departure,[22] and eliminated judicial review over any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or any other decision or action of the Attorney General, other than the granting of relief under section 208(a).[23] The statutory bars in INA §§240B(f) and 242(a)(2)(B)(i) relate to the review of the decision to grant voluntary departure and should be construed narrowly. [24]

While some of IIRAIRA's amendments to the INA somewhat limited the courts' review of various discretionary decisions by the Attorney General,[25] none of the amendments expressly addressed the power of the courts of appeals, as part of their review of petitions properly before them, to reinstate periods of voluntary departure previously granted by the BIA. Accordingly, in addressing this issue, the Court must look to the plain language of the Act.

The starting point for the interpretation of a statute is always its language[26] and courts must presume that a legislature says in a statute what it means and means in a statute what it says there.[27] In the absence of explicit language stripping the courts of appeals of authority to reinstate voluntary departure, none should be added.

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[22] INA § 240B(f).

[23] INA § 242(a)(2)(B)(i).

[24] *Zazueta-Carillo v. Ashcroft,* 322 F.3d 1166, 1169-70 (9th Cir. 2003).

[25] *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (noting "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts.")

[26] *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739 (1989).

[27] *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254 (1992).

The language in IIRAIRA is crystal clear: nowhere does IIRAIRA *prevent* a court during judicial review from reaffirming the lower court's decision. Any other reading overstates what IIRAIRA accomplished. "The words in the statute mean what they say."[28] It is plain error to read in a prohibition of such magnitude, which is clearly contrary to the plain language of the Act, Congressional history and the courts' equitable powers. This Court must "decline to add to the law what Congress has plainly excluded."[29] The Court's task is "not to interpret or to question the wisdom of it, but rather to interpret the language that was enacted as law."[30]

The words of IIRAIRA are unambiguous and the plain language clearly allows for appellate courts to review pre-existing grants of voluntary departure.

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[28] *Matter of Campos-Torres*, Interim Decision 3428 (BIA 2000).

[29] *Monet v. INS*, 791 F.2d 752, 754 (9th Cir. 1986) (*citing Fedorenko v. United States*, 449 U.S. 490, 517-18 (1981) (holding that courts are without equitable power to moderate or avoid statutory mandates of the immigration laws)).

[30] *Richards v. United States*, 369 U.S. 1, 10 (1962) (asserting that notwithstanding the ease of application inherent in an alternative construction of a statute, the courts "are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction")). *See also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (recognizing that "deportation is a drastic measure and at times the equivalent of banishment of exile").

II. THE EIGHTH CIRCUIT DECISION CONFLICTS WITH THE PLAIN READING OF THE JUDICIARY AND JUDICIAL PROCEDURE ACT, 28 U.S.C. § 2349, WHICH EXPRESSLY GRANTS FEDERAL COURTS AUTHORITY TO REINSTATE PROVISIONS OF THE FINAL ORDER.

Moreover, IIRAIRA does not vest authority to reinstate or extend voluntary departure *solely* in the DHS. INA § 240B and 8 C.F.R. 1240.26(f) both describe the authority of the *Attorney General,* not that of the courts. 8 U.S.C. § 1229c(b) describes the circumstances in which "[t]he Attorney General may permit an alien voluntarily to depart the United States."

The provisions that describe the authority of the *courts* provide instead that "[j]udicial review of a final order of removal . . . is governed only by chapter 158 of Title 28."[31] In turn, chapter 158 of Title 28 provides that

> "[t]he filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or *suspend,* in whole or in part, the operation of the order pending the final hearing and determination of the petition."[32]

IIRAIRA did not expressly revoke Title 28; accordingly, both statutes must be read consistently with each other.

"[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[33] It is axiomatic that IIRAIRA must be read in conformity with, and not in conflict with, other Federal Acts. Given their plain meaning, IIRAIRA and the Judiciary and Judicial Procedure Act are not in conflict: IIRAIRA allows

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[31] 8 U.S.C. § 1252(a)(1).

[32] 28 U.S.C. § 2349(b) (emphasis added).

[33] *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

for judicial review of pre-existing grant of voluntary departure, and the Judiciary and Judicial Procedure Act permits the federal courts to suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition for review.

A reading of IIRAIRA that strips the federal courts of its powers to reinstate voluntary departure would result in a flagrant disregard of the appellate courts' powers pursuant to Title 28, and is tantamount to an unconstitutional repeal of that latter Act. Federal courts maintain the ability to reinstate voluntary departure both through the plain meaning of IIRAIRA and a consistent reading of the Judiciary and Judicial Procedure Act. Any other interpretation unduly restricts federal court authority.

This case is no different from an appellate court's review of any other subject matter. Courts of appeal routinely restrain, in whole or in part, the operation of an administrative agency's order pending a final hearing and a determination of petition for review.[34] The suspension of such an order whether in the field of interstate commerce or immigration is not limited in duration to a finite number of days from the date of the order.

Both the First[35] and Ninth[36] Circuit Courts of Appeal have concluded that although court-ordered stays of voluntary departure delay departure and may impose costs on the government, such stays are necessary in some cases to ensure the right to meaningful judicial review. Additionally, those two courts have rejected the argument that a reinstatement of voluntary departure does not "extend" the period for departure. Instead, both courts have affirmed that it

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[34] *Superior Trucking Co., Inc. v. U. S.*, 614 F.2d 481 (5th Cir. 1980).

[35] *Nwankanma v. Ashcroft*, 352 F. 3d 325, 327 (6th Cir. 2003).

[36] *Zazueta-Carrillo v. Ashcroft*, 322 F. 3d 1166, 1176-77 (9th Cir. 2003).

merely restarts the clock for the running of the departure period designated by the agency. [37]

III. THE EIGHTH CIRCUIT DECISION CONFLICTS WITH NINTH CIRCUIT RATIONALE IN *ZAZUETA-CARRILLO V. ASHCROFT*, WHICH CONFIRMED THAT CIRCUIT COURTS HAVE JURISDICTION OVER PRE-EXISTING GRANTS OF VOLUNTARY DEPARTURE.

The Eighth Circuit's deletion of the reinstatement of voluntary departure conflicts with the Ninth Circuit's rationale in *Zazueta-Carrillo v. Ashcroft*.[38]

The Ninth Circuit's explanation regarding its authority to review voluntary departure issues in *Zazueta-Carrillo v. Ashcroft*[39] is instructive. The *Zazueta* Court analyzed the precise Statute under which it appears the Eighth Circuit revoked the grant of voluntary departure - INA § 240B(f). The Ninth Circuit acknowledged: "while IIRIRA eliminates judicial review of certain enumerated decisions entrusted to executive discretion it does not eliminate judicial review of all decisions bearing any relationship to voluntary departure."[40] Further, the Ninth Circuit confirmed it possessed jurisdiction to examine the issue of when the voluntary departure period begins because Zazueta-Carrillo was not appealing from a *denial* of a request for voluntary departure. In fact, the Court specifically found it retained

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[37] 8 U.S.C. § 1229c(b)(2) and 8 C.F.R. § 1240.26(f); *See Nwankanma*, 352 F. 3d at 327; *Zazueta-Carrillo*, 322 F. 3d at 1176.

[38] 322 F.3d 1166 (9th Cir. 2003).

[39] *Id.*

[40] *Zazueta* 322 F.3d 1166 *citing Lafarga v. INS*, 170 F.3d 1213, 1215 (9th Cir. 1999) ("[A]s to those elements of statutory eligibility, which do not involve the exercise of discretion, direct judicial review remains"); *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997) (same).

jurisdiction over the voluntary departure *because* his "request for voluntary departure was granted, not denied."[41]

Significantly, the Court found "because the BIA based its denial on its belief that Zazueta-Carrillo's voluntary departure period had expired does not transform the BIA's order into a different kind of order. *Given the plain language of the statute's first clause*, we are not divested of jurisdiction to hear this case."[42]

The Ninth Circuit further elaborated that this was not "a claim with respect to voluntary departure," within the meaning of the second clause of § 1229c(f). In short, the *Zazueta* Court itself acknowledged that while IIRAIRA did eliminate certain judicial review, the Act's *plain language* provided it with jurisdiction to review voluntary departure. By the *Zazueta-Carrillo* panel's own rationale, as long as the Court has jurisdiction to review certain voluntary departure issues, there *is* "reason to delay the voluntary departure period pending [its] review of that issue."[43]

As the Court in *Contreras-Aragon* said, when the Court affirms a BIA order, "[it] affirm[s] the order in total, including its grant of voluntary departure."[44] This Court has jurisdiction to review a final order of removal.[45] Because the final order includes the grant of voluntary departure, this Court has the authority to stay the commencement of the voluntary departure period until it has completed its review of the order.

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[41] *Id.* at 1168.

[42] *Id.* (emphasis supplied).

[43] 2003 U.S. App. LEXIS 4442, *9.

[44] *Contreras-Aragon v. INS*, 852 F.2d 1088, 1092 (9th Cir. 1988) (*en banc*).

[45] 8 U.S.C. § 1252.

IV. THE AUTHORITY OF FEDERAL COURTS TO REINSTATE VOLUNTARY DEPARTURE IS A MATTER OF NATIONAL IMPORTANCE.

The present matter is of national importance involving deep-seated issues of fundamental fairness, due process and human rights. As the First and Ninth Circuit have recognized, particularly in asylum cases, foreign nationals who voluntarily depart may be returning to home countries where they are unsafe or, even if safe, will not be allowed to return to the United States should they be successful on judicial review. For example, a foreign national who is deemed to have overstayed a grant of voluntary departure suffers harsh immigration consequences, and for practical purposes may not gain access to the American courts, particularly for foreign nationals deported to countries from which they sought asylum. In addition, certain forms of relief from removal may be considered abandoned if the foreign national leaves the United States. For example, if the petitioner had applied for adjustment of status to lawful permanent residence under 8 U.S.C. § 1255, that application would be considered abandoned upon departure from the country.

This Court would be well served in scrutinizing the Congressional history and legislative intent that prompted IIRAIRA's changes to voluntary departure. Congressional history reveals that the purpose of IIRAIRA's revisions to voluntary departure *was to ensure that people left*. The Committee House Report on Public Law No. 108-204 explained: "The title narrows eligibility for discretionary relief from removal and places strict limits on voluntary departure *to ensure that aliens actually leave the country*."[46] Further, the Senate Report clarified: It limits the appealability

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[46] H.R. REP. 104-879 Report on the activities of the Committee on the House Report No. 104-879 January 2, 1997 (emphasis supplied).

of removal orders, especially in the case of criminal aliens and those seeking discretionary relief from removal.[47]

The consequences of overstaying voluntary departure are draconian - any person who is granted voluntary departure is subject to civil penalties if he or she "fails voluntarily to depart the United States within the time period specified . . . and that person is barred from seeking an immigrant visa for a ten-year period."[48] Once a person fails to voluntarily depart, the voluntary departure order becomes a removal order, and any subsequent departure is considered a self-removal.[49] These consequences may bar Ms. Loulou from applying for an immigrant visa to join her United States citizen family for ten years.[50] Presently, Loulou's United States citizen husband has filed a spousal immigrant visa petition,[51] the first step in the green card process. Upon CIS's approval of the petition, Ms. Loulou will be eligible to obtain an immigrant visa petition from the United States Embassy in Addis Ababa, Ethiopia and reunite with her American husband.

Absent voluntary departure, Ms. Loulou will suffer harsh consequences. If she is deemed to have self-deported pursuant to a final removal order, and not voluntary departure, she will be barred from setting foot on American soil for ten years, thereby depriving her the ability to live once more with her United States citizen family. Loulou's harm is magnified because she had a settled expectation of voluntary departure after the Circuit Court reinstated it, and the CIS District Director acknowledged and extended the voluntary departure to enable her to remain in the United

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[47] S. REP. 104-249 Immigration Control and Financial Responsibility Act Senate Report No. 104-249 April 10, 1996.

[48] INA §240B(d).

[49] 8 C.F.R §240.26(d); 8 C.F.R §241.7.

[50] INA §242B(e)(2).

[51] A United States Citizen spouse completes a Form I-130 and submits this to CIS.

States for a few more days on order to celebrate her United States citizen husband's birthday prior to departing the United States.

Because the penalties for failing to depart are so harsh, the Court's unilateral revocation of voluntary departure would render callous results: foreign nationals, such as Ms. Loulou, who conformed their conduct in reliance on a pre-existing grant of voluntary departure would be left in a helpless situation. Moreover, revoking voluntary departure and following the *Zazueta-Carrillo* Court would wreak legal havoc: the Ninth Circuit failed to clarify the legal status of the petitioner of a successful petition for review who has departed the United States, with the result that the government may now argue that this "ten year bar" prevents these petitioners from returning to the United States, even if this Court grants their petition for review.

It is universally accepted that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[52] When the Court of Appeals grants a petition for review, the petitioner is restored to the legal position that she or he would have been in if the BIA had ruled correctly. [53]

Courts have often exercised their equitable powers to clarify certain provisions within the immigration statutes in order to prevent a harsh result and to fulfill the Congressional intent. There can be little doubt but that the legislative will would thwarted if the government could effectively ignore the prior grants of voluntary departure, deny this last sliver of relief to otherwise eligible persons, and then claim time has

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[52] *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *Jideonwo v. INS*, 224 F.3d 692, 696-97 (7th Cir. 2000).

[53] *See, e.g., Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987) ("reversal of the Board's order nullifies the order and restores the alien's lawful permanent resident status").

run out to apply. Courts always retain the authority to restore a person to the position that she or he was in prior to a due process violation.[54]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, and the original judgment reinstated.

Respectfully Submitted,

HERBERT A. IGBANUGO
Counsel of Record
RIDDHI JANI
Blackwell Igbanugo, P.A.,
Suite 250
3601 W. 76th Street
Minneapolis, MN 55435
952-646-0400

Counsel for Petitioner

Monday, July 19, 2004

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[54] *See El Himri v. Ashcroft,* 344 F. 3d 1261, 1262 (9th Cir. 2003) (holding that "the District Director's authority to extend voluntary departure time periods does not limit this court's equitable authority to grant a stay of the voluntary departure time period.")

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3004

Teyent Loulou,	*	
Petitioner,	*	
	*	Petition for Review of an
v.	*	Order of the Board of
	*	Immigration Appeals
John Ashcroft,	*	
Respondent.	*	

Having considered the government's petition for panel rehearing and the petitioner's response, the petition is granted and the panel will file a substituted opinion deleting the last full sentence of the opinion filed on December 30, 2003.

April 28, 2004

Order Entered at the Direction of the Court:

s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
For The Eighth Circuit

No. 02-3004

Teyent Loulou,	*	
	*	
Petitioner,	*	Petition for Review of an
	*	Order of the Board of
v.	*	Immigration Appeals
	*	
John Ashcroft,	*	
	*	
Respondent.	*	

Submitted: November 19, 2003
Filed: December 30, 2003
Amended: April 28, 2004

Before MURPHY, LAY, and FAGG, Circuit Judges.

FAGG, Circuit Judge.

Teyent Loulou, a native of Ethiopia, petitions for review of a removal order issued by the Board of Immigration Appeals (BIA) holding her removable and ineligible for asylum and withholding of removal. Loulou alleged she has a well-founded fear of persecution in Ethiopia because of her political opinion and ethnic group. At a hearing, Loulou testified her parents had been persecuted in Ethiopia after her departure, but she presented no corroborating evidence. An immigration judge (IJ) found

Loulou was not credible and she failed to provide easily obtainable documentation to support her claims. Loulou appealed, and the BIA affirmed without opinion under its recently adopted streamlined review procedure, 8 C.F.R. § 3.1(a)(7). In her petition for review, Loulou contends the streamlined review procedure violates due process and there was substantial evidence of her family's past persecution and of her well-founded fear of persecution to warrant a grant of asylum. We deny Loulou's petition.

We first consider Loulou's due process challenge to the streamlined review procedure. In response to an exploding caseload, the Immigration and Naturalization Service (INS) established streamlined review procedures in 1999. Although an IJ's decision is ordinarily reviewed by a three-member panel of the BIA, the streamlined review regulation authorizes an individual BIA member to affirm the IJ's decision without opinion when the individual member decides that the result was correct, that any errors were harmless or nonmaterial, and either that the issue on appeal is squarely controlled by existing BIA or federal court precedent and does not involve a novel factual situation, or that the factual and legal questions raised are so insubstantial that three-member review is not warranted. 8 C.F.R. § 3.1(a)(7)(ii). When an individual BIA member streamlines an appeal, the IJ's order is the final agency determination for the purposes of judicial review. Id. § 3.1(a)(7)(iii).

Loulou contends the BIA's summary affirmance violated her due process rights because the summary affirmance fails to give individualized attention to her case and frustrates our review. We join our sister circuits in concluding the streamlined review procedure does not violate an alien's due process rights. Falcon Carriche v. Ashcroft, 335 F.3d 1009, 1012-15 (9th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962, 966-67 (7th Cir. 2003); Mendoza v. U.S. Attorney General, 327 F.3d 1283, 1288-89 (11th Cir. 2003);

Soadjede v. Ashcroft, 324 F.3d 830, 831-33 (5th Cir. 2003) (per curiam); Albathani v. INS, 318 F.3d 365, 375-78 (1st Cir. 2003). An alien has no constitutional or statutory right to an administrative appeal. Mendoza, 327 F.3d at 1289. Any rights to an administrative appeal are created by regulations issued by the Attorney General, and under the regulations, aliens have no right to a full opinion by the BIA. Id. Further, the streamlined review procedure does not compromise our ability to review the INS's decision because we can review the IJ's decision directly. Id.; Falcon Carriche, 335 F.3d at 1014; Georgis, 328 F.3d at 967. Indeed, even before the streamlined review procedure was adopted, we recognized the BIA could affirm, without additional explanation, an IJ's opinion, making the IJ's opinion the subject of our judicial review. Maashio v. INS, 45 F.3d 1235, 1238 (8th Cir. 1995); see Soadjede, 324 F.3d at 832 (citing cases holding same from most circuits).

In this case, Loulou received a full hearing before an IJ, a detailed and reasoned opinion from the IJ, an opportunity to present arguments to the BIA, and a decision from a BIA member. There is no evidence the BIA member did not review the facts of Loulou's case or otherwise failed to conduct the required review. See Mendoza, 327 F.3d at 1289; Soadjede, 324 F.3d at 832. We thus conclude the BIA's summary affirmance did not violate any due process rights.

Loulou also challenges the IJ's denial of her asylum claim. The Attorney General may grant asylum to aliens who are unable or unwilling to return to their country of origin "because of persecution or a well-founded fear of persecution on account of . . . political opinion." 8 U.S.C. § 1101(a)(42)(A); see Melecio-Saquil v. Ashcroft, 337 F.3d 983, 986 (8th Cir. 2003). Loulou alleges she has a well-founded fear of persecution on account of her political opinion because the current Ethiopian government, the Ethiopian People's Revolutionary Democratic Front

(EPRFD), persecuted her parents, ethnic Amharas and members (but not officers) of the All-Amhara People's Organization (AAPO). Loulou is also of Amhara ethnicity and a member of the All-Amhara People's Relief and Development Association, the American relief arm of the AAPO, which protested a visit to the United States by members of the EPRFD. At the hearing before the IJ, Loulou claimed her father was fired from his government job in Ethiopia, arrested after attending an AAPO rally, tortured, beaten, taken to a hospital, and killed by police two years later. Loulou also claimed her mother has been detained and interrogated several times about her husband's whereabouts.

The IJ denied Loulou's application for asylum finding Loulou failed to show she had a well-founded fear of persecution. We must accept this finding unless Loulou shows "'no reasonable factfinder could fail to find the requisite fear of persecution.' Id. (quoting INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992)). A well-founded fear of persecution is both subjectively genuine and objectively reasonable. Id. To show fear of persecution is objectively reasonable, an alien must present "credible, direct, and specific evidence of facts that show a reasonable person in the alien's position would fear persecution if returned to the alien's native country." Ghasemimehr v. INS, 7 F.3d 1389, 1390 (8th Cir. 1993) (per curiam). Although an applicant for asylum need not always corroborate her testimony, we defer to an IJ's finding that an alien's testimony is not credible if the finding is supported by a specific, cogent reason for disbelief. Melecio-Saquil, 337 F.3d at 987. An alien's failure to present easily available, material, corroborating evidence to support her asylum claim may doom her application for asylum. See Perinpanathan v. INS, 310 F.3d 594, 598 (8th Cir. 2002); Sidhu v. INS, 220 F.3d 1085, 1090 (9th Cir. 2000).

Here, the IJ specifically found Loulou's testimony was not credible and she had not provided easily obtainable

documentation to corroborate and support her claim. The IJ had specific, cogent reasons for disbelieving Loulou. See Melecio-Saquil, 337 F.3d at 987. For example, Loulou testified she had last spoken to her mother in June 1998, when her mother called from Ethiopia, but in reality, Loulou spoke to her less than thirty days before the hearing while her mother was visiting the United States. Despite her mother's presence in the country and her value as the only potential witness with first-hand knowledge of the alleged persecution, Loulou did not tell her own attorney about her mother's presence. Instead, the IJ learned Loulou's mother was here through the testimony of another witness. Rather than presenting her mother's testimony under oath, telephonically or otherwise, Loulou submitted two unsworn letters that failed to answer many obvious questions. Under the circumstances, substantial evidence supports the IJ's decision that Loulou's failure to call her mother as a witness had a major adverse impact on her credibility. See Sidhu, 220 F.3d at 1089-91.

Loulou's testimony contained other material inconsistencies that cast doubt on her credibility. Loulou testified police had murdered her father, but in an affidavit claimed he had gone into hiding. She testified police harassed her mother about her father's whereabouts after his disappearance, yet claimed police had killed him before the harassment allegedly occurred. Loulou also stated her mother reported her father's disappearance, but there are no police reports documenting his disappearance. Likewise, Loulou did not attempt to obtain hospital records showing her father had been hospitalized. Further, neither Loulou nor her mother sought assistance from their human rights organizations to find him or determine his fate. Loulou also failed to explain her mother's ability to travel to the United States for an extended vacation, despite her alleged persecution.

In sum, substantial evidence supports the IJ's conclusion that Loulou is not eligible for asylum. We thus deny Loulou's petition for review of the BIA's decision.

United States Court of Appeals
For the Eighth Circuit

No. 02-3004

Teyent Loulou,	*	
	*	
Petitioner,	*	On Petition for Review from
	*	Immigration and Naturalization
v.	*	Service
	*	
John Ashcroft,	*	
	*	
Respondent.	*	

Submitted: November 19, 2003

Filed: December 30, 2003

Before MURPHY, LAY, and FAGG, Circuit Judges.

FAGG, Circuit Judge.

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corroborating evidence. An immigration judge (IJ) found Loulou was not credible and she failed to provide easily obtainable documentation to support her claims. Loulou appealed, and the BIA affirmed without opinion under its recently adopted streamlined review procedure, 8 C.F.R. § 3.1(a)(7). In her petition for review, Loulou contends the streamlined review procedure violates due process and there was substantial evidence of her family's past persecution and of her well-founded fear of persecution to warrant a grant of asylum. We deny Loulou's petition.

We first consider Loulou's due process challenge to the streamlined review procedure. In response to an exploding caseload, the Immigration and Naturalization Service (INS) established streamlined review procedures in 1999. Although an IJ's decision is ordinarily reviewed by a three-member panel of the BIA, the streamlined review regulation authorizes an individual BIA member to affirm the IJ's decision without opinion when the individual member decides that the result was correct, that any errors were harmless or nonmaterial, and either that the issue on appeal is squarely controlled by existing BIA or federal court precedent and does not involve a novel factual situation, or that the factual and legal questions raised are so insubstantial that three-member review is not warranted. 8 C.F.R. § 3.1(a)(7)(ii). When an individual BIA member streamlines an appeal, the IJ's order is the final agency determination for the purposes of judicial review. Id. § 3.1(a)(7)(iii).

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Attorney General, 327 F.3d 1283,1288-89 (11th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 831-33 (5th Cir. 2003) (per curiam); Albathani v. INS, 318 F.3d 365, 375-78 (1' Cir. 2003). An alien has no constitutional or statutory right to an administrative appeal. Mendoza, 327 F.3d at 1289. Any rights to an administrative appeal are created by regulations issued by the Attorney General, and under the regulations, aliens have no right to a full opinion by the BIA. Id. Further, the streamlined review procedure does not compromise our ability to review the INS's decision because we can review the IJ's decision directly. Id.; Falcon Carriche, 335 F.3d at 1014; Georgis, 328 F.3d at 967. Indeed, even before the streamlined review procedure was adopted, we recognized the BIA could affirm, without additional explanation, an IJ's opinion, making the IJ's opinion the subject of our judicial review. Maashio v. INS, 45 F.3d 1235, 1238 (8th Cir. 1995); see Soadjede, 324 F.3d at 832 (citing cases holding same from most circuits).

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Ethiopian People's Revolutionary Democratic Front (EPRFD), persecuted her parents, ethnic Amharas and members (but not officers) of the All-Amhara People's Organization (AAPO). Loulou is also of Amhara ethnicity and a member of the All-Amhara People's Relief and Development Assocation, the American relief arm of the AAPO, which protested a visit to the United States by members of the EPRFD. At the hearing before the IJ, Loulou claimed her father was fired from his government job in Ethiopia, arrested after attending an AAPO rally, tortured, beaten, taken to a hospital, and killed by police two years later. Loulou also claimed her mother has been detained and interrogated several times about her husband's whereabouts.

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Here, the IJ specifically found Loulou's testimony was not credible and she had not provided easily obtainable documentation to corroborate and support her claim. The IJ had specific, cogent reasons for disbelieving Loulou. See Melecio-Saquil, 337 F.3d at 987. For example, Loulou testified she had last spoken to her mother in June 1998, when her mother called from Ethiopia, but in reality, Loulou spoke to her less than thirty days before the hearing while her mother was visiting the United States. Despite her mother's presence in the country and her value as the only potential witness with first-hand knowledge of the alleged persecution, Loulou did not tell her own attorney about her mother's presence. Instead, the IJ learned Loulou's mother was here through the testimony of another witness. Rather than presenting her mother's testimony under oath, telephonically or otherwise, Loulou submitted two unsworn letters that failed to answer many obvious questions. Under the circumstances, substantial evidence supports the IJ's decision that Loulou's failure to call her mother as a witness had a major adverse impact on her credibility. See Sidhu, 220 F.3d at 1089-91.

Loulou's testimony contained other material inconsistencies that cast doubt on her credibility. Loulou testified police had murdered her father, but in an affidavit claimed he had gone into hiding. She testified police harassed her mother about her father's whereabouts after his disappearance, yet claimed police had killed him before the harassment allegedly occurred. Loulou also stated her mother reported her father's disappearance, but there are no police reports documenting his disappearance. Likewise, Loulou did not attempt to obtain hospital records showing her father had been hospitalized. Further, neither Loulou nor her mother sought assistance from their human rights organizations to find him or determine his fate. Loulou also failed to explain her mother's ability to travel to the United States for an extended vacation, despite her alleged persecution.

In sum, substantial evidence supports the IJ's conclusion that Loulou is not eligible for asylum. We thus deny Loulou's petition for review of the BIA's decision. We vacate the order of deportation, however, and reinstate Loulou's previously granted voluntary departure period under terms and conditions prescribed by the BIA. See Velasquez v. Ashcroft, 342 F.3d 55, 59 (1st Cir. 2003); Aiyadurai v. INS, 683 F.2d 1195, 1201 (8th Cir. 1982).

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-309-495 - Date: July 9, 2002

In re: LOULOU, TEYENT

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Getachew, Konjit, Esq.

ON BEHALF OF SERVICE: Terry M. Louie, Assistant District
Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f).

In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

s/_____

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
7850 Metro Parkway, Room 320
Bloomington, MN 55425

In the Matter of Case A 75-309-495

Loulou Teyant
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on July 31, 1998. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[X] Respondent's application for voluntary departure was granted until August 31, 1998 upon posting a bond in the amount of $ 2,500.00 with an alternate order of removal to Ethiopia.

[X] Respondent's application for asylum was
( ) granted (X) denied ( ) withdrawn.

[X] Respondent's application for withholding of removal was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under sectionof the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____until _____.

[ ] As a condition of admission, respondent is to post a $_____bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[X] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.

[ ] Other:

Date: July 31, 1998
Appeal: ( ) Applicant ( ) INA (X) Both ( ) Waived
Appeal Due By: August 31, 1998

s/_____
Immigration Judge

E-Mail: **BLACKWELL IGBANUGO**

Riddhi Jani
Direct Dial: 952-646-0365
E-Mail: rjani@blackwell-law.com

January 16, 2004

Mr. Paul LeBrasseur

Detention and Removal
Immigration and Customs Enforcement
Department of Homeland Security
2901 Metro Drive

Suite 100

Bloomington, MN 55425

RE: Teyent Loulou (A 75 309 495)
REQUEST FOR 41-DAY EXTENTION OF VOLUNTARY DEPARTURE
Our File Number 10000-0660

Dear Mr. LeBrasseur:

I write to request your kind assistance in extending Ms. Loulou's voluntary departure by 41 days from March 21, 2004 until Saturday, May 1, 2004.

Ms. Loulou requests this extension for several reasons: first, as a newly wed wife, she wishes to celebrate the birthday of her husband on April 26th 2004. Second, because she is a conscientious hardworking employee, she asks for time to wrap things up with her long-time employer.

Third, after fourteen years in the United States, she wishes to express her farewells to her friends, family and of course her husband. Finally, ICE currently possesses Ms. Loulou's passport, which she needs to extend as soon as possible.

Would you please forward to me as soon as possible Ms. Loulou's original passport at the above-listed address, so that Ms. Loulou can renew and receive her new passport?

I thank you for your compassionate consideration of this request, and remain,

Yours sincerely,

s/_____
Riddhi Jani, Esq.
RJ/kl

cc: Ms. T. Loulou

BLACKWELL IGBANUGO

Riddhi Jani
Direct Dial: 952-646-0365
E-Mail: rjani@blackwell-law.com

Officer Robert Johnson
United States Department of Homeland Security
Bureau of Immigration and Customs Enforcement
2901 Metro Drive, Suite 100
Bloomington, MN 55425

January 28, 2004 *Via Facsimile (612-313-9064)*

Re: Extension of Voluntary Departure for
Teyent Loulou
A 75 309 495
Our File No. 10000-0660

Dear Officer Johnson:

I write to notify you that Ms. Loulou has purchased a one-way ticket to Ethiopia for Monday April 26, 2004. Her flight on Ethiopian Airlines leaves at 12:55 p.m.

Ms. Loulou and I plan on presenting the ticket to you this Friday, January 30 at 9:15 a.m. Please let me know if that time does not work for you. At that time, I would also be obliged if you would return Ms. Loulou's passport so that she may expeditiously renew it.

Finally, I would be grateful if would you please confirm in writing the extension of Ms. Loulou's voluntary departure until April 26, 2004.

I look forward to seeing you this Friday the 30th at 9:15 a.m., and remain,

Yours Sincerely,

s/_____
Riddhi Jani, Esq.

cc: Mrs. Loulou

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Action – Voluntary Departure

Please refer to this file number:

File: A75 309 495
Date: January 30, 2004

To: Teyent LOULOU

Please note: the blocks checked below relate to action taken in your case.

☐ You have violated the terms on your admission as a nonimmigrant. Consequently, the permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐ In accordance with a decision made in your case, you are required to depart from the United States at your own expense on or before_____.

☒ Your request for an extension of time in which to depart from the United States has been Approved. You are required to depart on or before April 26, 2004.

☐ The amount of time that you have been granted to depart voluntarily is the maximum allowable under the law in your situation. You are, therefore, prohibited from applying for or been granted any further voluntary departure.

☐ You our request for voluntary departure has been denied since you were previously granted voluntary departure and failed to depart.

☐ You are ineligible for voluntary departure because you were previously permitted to depart voluntarily after you

were found inadmissible as an alien who was present without having been admitted or paroled.

❑ You must notify this office on or before _____of the arrangements you have made to effect your-departure, including the date, place and manner. Use the enclosed self-addressed card to notify this office regarding departure arrangements. Postage is not required. At the time of your departure you must surrender Form I-94 ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

NOTICE: Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your removal. Failure to depart on or before the specified date may also subject you to a possible civil penalty or not less than $1,000 and not more than $5,000, and reader you ineligible for a period of 10 years for any farther authorization for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Immigration and Nationality Act.

If there is a bond outstanding in your case, you are warned that, to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

Sincerely,

s/_____
Robert Johnson; DO

FOR IMMIGRATION AND NATURALIZATION
SERVICE USE ONLY

Departed: Port_____
Date_____

❑ I-94 stamped
❑ I-530 submitted

To_____
Via _____

❑ DACS Updated

Supreme Court, U.S.
FILED
OCT 15 2004
OFFICE OF THE CLERK

(2)

No. 04-113

In the Supreme Court of the United States

TEYENT LOULOU, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in amending its opinion denying a petition for review of a decision of the Board of Immigration Appeals by deleting a sentence that had reinstated the Board's authorization of voluntary departure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A7) is reported at 354 F.3d 706. The orders of the Board of Immigration Appeals (Pet. App. A14-A15) and the immigration judge (Pet. App. A16-A18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2004. The petition for a writ of certiorari was filed on July 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 8 U.S.C. 1229c, the Attorney General (now the Secretary of Homeland Security[1]) has the discretion to permit an alien found to be removable from the United States to depart voluntarily no later than 60 days after the conclusion of removal proceedings, provided that certain eligibility requirements are satisfied. Failure to depart within the prescribed period subjects an alien to a civil penalty of up to $5000 and renders the alien ineligible for several types of immigration relief for a period of ten years. 8 U.S.C. 1229c(d). The implementing regulation states that the authority to extend the voluntary-departure period specified by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) rests "only" with certain officials of DHS, 8 C.F.R. 1240.26(f), and 8 U.S.C. 1252(a)(2)(B)(i) provides that no court shall have jurisdiction to review a judgment "regarding the granting of relief under * * * [8 U.S.C.] 1229c."

2. Petitioner is a native of Ethiopia who entered the United States in September 1991 on a student visa but remained beyond the date of its expiration. In 1997, petitioner applied for asylum, claiming that she would be persecuted in Ethiopia because of her political opinions and ethnicity. Finding her claim not to be credible, an IJ denied asylum and ordered her removed to Ethiopia. In the same order, which was issued on July 31, 1998, the IJ granted petitioner's application for volun-

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[1] On March 1, 2003, the Immigration and Naturalization Service ceased to exist as an agency within the Department of Justice and its functions were transferred to the newly formed Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)).

tary departure, on the condition that she post a bond in the amount of $2500 and depart the United States by August 31, 1998. A.R. 50-70, 315-321, 678; Pet. App. A16-A18.

The BIA affirmed the IJ's decision without opinion, Pet. App. A14-A15, but permitted petitioner "to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director." *Id.* at A14. The BIA's order, which was issued on July 9, 2002, informed petitioner that she would be subject to a civil penalty and would be ineligible for certain relief under the immigration laws for a period of ten years if she failed to depart "within the time period specified, or any extensions granted by the district director." *Id.* at A15.

3. The court of appeals denied petitioner's petition for review. Pet. App. A8-A13. It rejected petitioner's constitutional challenge to the BIA's streamlined review procedure (*id.* at A9-A10) and found that the IJ's denial of her asylum application was supported by substantial evidence (*id.* at A10-A12). In the final sentence of its initial opinion, the court *sua sponte* "reinstate[d] [petitioner's] previously granted voluntary departure period under terms and conditions prescribed by the BIA." *Id.* at A13.

The court of appeals' opinion was filed on December 30, 2003. Pet. App. A8. Shortly thereafter, petitioner asked DHS to extend the deadline for voluntary departure to April 26, 2004. *Id.* at A21-A22. On January 30, 2004, DHS granted petitioner's request. *Id.* at A23-A25.

On March 5, 2004, the government filed a petition for panel rehearing, asking the court to reconsider its reinstatement of voluntary departure. Resp. Pet. for Panel

Reh'g 3-11. The court granted the petition and "file[d] a substituted opinion deleting the last full sentence of the [original] opinion." Pet. App. A1. In all other respects, the substituted opinion (*id.* at A2-A7) was identical to the original opinion.

ARGUMENT

Petitioner asks the Court to grant certiorari to decide whether a court of appeals may reinstate an administrative order allowing an alien found to be removable to depart the United States voluntarily. Pet. 10-20. The petition should be denied. The question on which review is sought was not decided by the court of appeals in this case; the question has been answered the same way by every court of appeals to consider it; and, because petitioner apparently left the country by the extended departure date set by DHS, the question in this case is moot.

1. In its petition for rehearing, the government asked the court of appeals either to "permit the parties to fully brief and argue the reinstatement issue" or to "amend its decision to eliminate the grant of voluntary departure." Resp. Pet. for Panel Reh'g 11. The court granted only the latter relief: it "file[d] a substituted opinion deleting the last full sentence of the [initial] opinion." Pet. App. A1. The opinion of which petitioner seeks review thus does not address the question presented in her certiorari petition, much less hold that a court of appeals lacks the authority to reinstate voluntary departure. This Court ordinarily "do[es] not decide in the first instance issues not decided below," *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999), and there is particular reason to follow that practice in a case, like this one, in which a question not decided below is the only one presented in the petition.

2. Reasoning that the relevant statutes and regulations give officials in the Executive Branch the exclusive authority to set the date by which an alien must voluntarily depart, the Third Circuit, the Fourth Circuit, and the Eighth Circuit (in a decision postdating the decision below) have all concluded that a court of appeals has no power to reinstate an order of voluntary departure.[2] Contrary to petitioner's suggestion (Pet. 4-5, 15-16), neither the First Circuit nor the Ninth Circuit has reached a contrary conclusion. The Ninth Circuit has in fact rejected the position advanced by petitioner, see *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1173 (2003) (courts lack power to "extend[] voluntary departure beyond the period specified by the executive officers"), and the First Circuit has declined to decide the issue, see *Khalil* v. *Ashcroft*, 370 F.3d 176, 180 (2004) ("not[ing] but not decid[ing]" whether court lacks authority to reinstate order of voluntary departure). There is thus no conflict in the circuits on the question presented in the petition.

3. The court of appeals filed its initial opinion on December 30, 2003, Pet. App. A8, and filed its amended opinion, which deleted the sentence reinstating voluntary departure, on April 28, 2004, *id.* at A2. On January

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[2] See *Reynoso-Lopez* v. *Ashcroft*, 369 F.3d 275, 280 (3d Cir. 2004) ("because Congress has not provided statutory authority for appellate courts to reinstate * * * the voluntary departure period prescribed by an IJ or the BIA, this Court lacks jurisdiction to reinstate [an alien's] voluntary departure period"); *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 193 (4th Cir. 2004) ("a court of appeals lacks jurisdiction to entertain a request to reinstate voluntary departure"); *Rife* v. *Ashcroft*, 374 F.3d 606, 614 (8th Cir. 2004) ("our jurisdiction to grant this voluntary departure relief was eliminated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996").

30, 2004, a month after the court filed its initial opinion and nearly three months before the court amended its opinion, petitioner obtained from DHS an extension of her voluntary-departure date to April 26, 2004, *id.* at A23, and the certiorari petition states that she left the United States by that date, see Pet. 9. If that is so, then, contrary to petitioner's contention, she will not be "subject to a ten-year bar to re-entry," Pet. 5, because that bar applies only when an alien fails to depart "within the time period specified" by the IJ or BIA, 8 U.S.C. 1229c(d), or "extend[ed]" by DHS, 8 C.F.R. 1240.26(f). See Pet. App. A15 (BIA order) (warning petitioner of consequences of failure to depart "within the time period specified, or any extensions granted by the district director"). Because, on the basis of petitioner's representation, her rights are unaffected by whether the court of appeals had the authority to reinstate voluntary departure, the question presented in the petition is moot. This Court is "not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2004